No. 42430-4-II

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

IN RE THE PERSONAL RESTRAINT PETITION OF:

JEROME C. PENDER,

PETITIONER.

REPLY IN SUPPORT OF PERSONAL RESTRAINT PETITION

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A. INTRODUCTION

Sometime between 6 and 7 p.m., someone shot Marcus Reed as he was walking to a work release center in Olympia. Jerome Pender, who did not match the description of the shooter, left Tacoma at 5:45 and claimed he was driving to Olympia when the crime occurred.

Pender was tried twice. His first jury hung. His second jury convicted him. During both trials, the State attempted to set the time of the shooting at 7—in order to negate Pender's alibi. During the first trial Brandon Franklin testified that at approximately 6:00 pm, he was on his way to the Olympia work release building to attend a class when he saw two young men, whom he believed to be Hispanic, sitting on some steps nearby. At some point after Franklin's class started, he and his classmates heard several gunshots. Franklin later identified Pender from a photomontage.

During the second trial the State did not call Franklin. Instead, the defense tried to call him. However, the State now opposed Franklin's testimony. Defense counsel offered Franklin's testimony, but only for the limited purpose of demonstrating that eyewitness identification was fallible. Trial counsel admits that he had no tactical reason to limit the offer of proof. Trial counsel wanted to present Franklin's testimony because it

helped create a reasonable doubt about whether Pender shot Reed. Because counsel did not say so, Franklin was not permitted to testify.

With a proper offer, Franklin's testimony was admissible. Franklin put the shooting at an earlier time than the other witnesses—a time when Pender was unable or unlikely to be in Olympia. Pender was prejudiced because Franklin's testimony was the singular difference between the first trial (ending in a mistrial) and the second (ending in conviction).

Pender was also prejudiced because he required to wear a shock device during his second trial without any showing of a security necessity. Shock devices prejudice defendants in two ways. If any juror saw the outline of the device under his clothes, then he was prejudiced because the use of the device contradicts the presumption of innocence and suggests that Pender was dangerous. Pender was also prejudiced because the threat of being shocked interfered with his ability to consult with counsel. This Court should remand this claim for an evidentiary hearing.

Finally, Pender was charged with committing the crime while armed with a deadly weapon. He was later sentenced for a firearm enhancement—an uncharged alternative. A defendant cannot be sentenced for an uncharged crime. Weapon enhancements are divided into two mutually exclusive categories—firearms and deadly weapons *other than firearms*. Because an operable firearm is by definition not a deadly weapon, this Court should dismiss the enhancement.

C. ARGUMENT

1. Mr. Pender Was Denied His Sixth Amendment Right to Effective Assistance of Counsel When Counsel Made an Insufficient Offer of Proof.

Introduction

The State makes two arguments in response to Pender's claim of ineffective assistance of counsel for failing to make an adequate offer of proof in order to admit Mr. Franklin's testimony. The State argues that this Court should not reach this issue because a similar issue was raised on direct appeal, despite the fact that it is based on evidence unavailable at that juncture.

The Relitigation Bar Does Not Apply

The State mischaracterizes the relitigation bar. Under Washington law, a personal restraint petitioner may raise an issue decided on direct appeal if the "interests of justice require relitigation." *Personal Restraint of Taylor*, 105 Wn.2d 683, 688, 717 P.2d 755 (1986). Washington courts have never precisely defined the "interests of justice" standard. Rather, they have adopted the intentionally loose test originally set out by the U.S. Supreme Court in *Sanders v. United States*, 373 U.S. 1 (1963). *See Taylor*, 105 Wn.2d at 688-89, *quoting Sanders*, 373 U.S. at 17 ("ends of justice" standard "cannot be too finely particularized"). The "ends of justice" standard "is clearly not a 'good cause' standard." *Personal Restraint of Holmes*, 121 Wn.2d 327, 330, 849 P.2d 1221 (1993).

Consequently, Washington courts have re-examined claims whenever a petitioner raises "new points of fact and law that *were not* or could not have been raised in the principal action, to the prejudice of the defendant." *Personal Restraint of Gentry*, 137 Wn.2d 378, 388, 972 P.2d 1250 (1999) (emphasis added). There does not appear to be any Washington case in which an appellate court found that the petitioner had established that he was otherwise entitled to relief, yet refused to entertain the claim because the ends of justice did not favor relitigation. In fact, Taylor explains that the ends of justice will always be satisfied whenever a petitioner "is actually prejudiced by the error." *Taylor*, 105 Wn.2d at 688.

In addition, state courts have found the "ends of justice" to be satisfied when a petitioner presents additional allegations in support of the same legal claim made on direct appeal, when he presents the same allegations but improves his constitutional analysis, and when the court was simply wrong the first time around. For example, in *Personal Restraint of Brett*, 142 Wn.2d 868, 16 P.3d 601 (2001), the state court found trial counsel ineffective in failing to present expert testimony concerning the defendant's medical and mental conditions. Brett had previously argued on direct appeal that trial counsel were ineffective, and had specifically relied on counsel's failure to explore Brett's fetal alcohol syndrome. *Id.* at 883 (conc. op. of Talmadge, J.) *citing State v. Brett*, 126 Wn.2d 136, 202-04, 892 P.2d 29 (1995). *See also, State v. Brett*, 126 Wn.2d at 198-200.

Nevertheless, the stronger evidence of ineffectiveness presented in the PRP justified revisiting the issue and granting relief.

In *Personal Restraint of Percer*, 111 Wn. App. 843, 47 P.3d 576 (2002), the Washington Court of Appeals permitted the petitioner to relitigate an issue simply because the Court was convinced it had made a mistake in the direct appeal. The Washington Supreme Court reversed on the merits, but confirmed that the Court of Appeals properly reviewed the claim. *Percer*, 150 Wn.2d at 54.

Because Pender's claim depends on facts outside the record, this PRP is the appropriate vehicle in order to bring the claim. *State v. McFarland,* 127 Wn.2d 322, 338, 899 P.2d 1251 (1995).

Prejudice

Mr. Franklin's testimony was the primary difference between the first and second trial. The State does not point to any other differences in the trial or offer another reason why the two trials turned out differently. That fact alone should undermine this Court's confidence in the verdict.

The State asks this Court to ignore what two juries did and replace it with rank speculation. The differing outcomes of the two trials are the very best possible evidence that Pender was prejudiced. Trial counsel relied heavily on Franklin's testimony to create a reasonable doubt in the first trial. 2007 RP 332-34. In the second trial, counsel could not make the same argument because counsel did not have the same evidence available.

Conclusion

At a minimum, this Court should remand this claim for an evidentiary hearing.[1] However, because the State has not disputed Pender's new facts, this Court can also reverse and remand for a new trial.

2. Pender Was Denied His Right to Due Process, A Fair Trial, To Be Present, To Counsel, and To Confront When He Was Forced to Wear a Shock Device at Trial—a Device that Had a Profound Psychological Impact on Him—Without any Showing of a Security Need.

   Pender Was Denied His Sixth Amendment Right to Effective Assistance of Counsel When Counsel Failed to Object to the Stun Belt that Pender Was Forced to Wear.

Stun belts or shock devices can prejudice a defendant in two ways: (1) if a juror sees the device, it undermines the presumption of innocence and suggests to jurors that the defendant is dangerous; and (2) unlike

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[1] Washington courts have three options regarding constitutional issues raised in a personal restraint petition:

1. If a petitioner fails to meet the threshold burden of showing actual prejudice arising from constitutional error, the petition must be dismissed;

2. If a petitioner makes at least a *prima facie* showing of actual prejudice, but the merits of the contentions cannot be determined solely on the record, the court should remand the petition for an evidentiary hearing;

3. If a petitioner makes a prima facie claim of error and the facts are not disputed, the court should grant the Personal Restraint Petition without remanding the cause for further hearing.

RAP 16.11(a); RAP 16.12; *In re PRP of Rice*, 118 Wn.2d 876, 828 P.2d 1086 (1992); *In re PRP of Hews*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983). See also RAP 16.12 (concerning conduct of the "evidentiary hearing" or "reference hearing" and stating that it is the Superior Court to which that hearing is referred that must enter "findings of fact" when it is over); RAP 16.13 (describing procedure after reference hearing and reiterating that Superior Court is the one that makes "findings of fact" and forwards them to the appellate court).

shackles, it creates a psychological condition that interferes with a defendant's ability to consult with counsel and freely express emotion during trial.

The State first argues that Pender has not made a sufficient showing that any juror saw the device. To the contrary, Pender has made the showing necessary for an evidentiary hearing.

The State's response largely rests on *In re PRP of Davis,* 152 Wash.2d 647, 101 P.3d 1 (2004). However, what the State overlooks is that Davis was given an evidentiary hearing to determine whether any jurors saw the shackles around Davis' ankles based on the same quantum of evidence that Pender sets forth in this PRP. In fact in *Davis*, the record reflected an attempt to obscure the ankle shackles from the view of jurors. 152 Wn.2d at 677.

In his PRP, Davis raised the issue as a claim of ineffective assistance of counsel for failing to object. Davis did not show in his PRP that jurors saw the shackles. Instead, the possibility that one juror saw the shackles was sufficient to remand for an evidentiary hearing. *Davis* noted: "Because the record was unclear as to the extent to which the jury could detect that the defendant was physically restrained, this court remanded for a hearing on the following questions:

> (1) What type of restraint devices were used to restrain petitioner, Cecil Davis, during the guilt and penalty phases of Davis's trial?

> (2) What precautions, if any, were taken during the entire trial to prevent jurors from gaining knowledge that Davis was in restraints as he entered or was in the courtroom?
>
> (3) What jurors, if any, personally observed that Davis was fitted with restraint devices during the course of the guilt and/or penalty phases of the trial?
>
> (4) If any juror observed Davis in restraints, what was the extent of the juror's observations?
>
> (5) What jurors, if any, learned from other jurors that Davis was restrained? Indicate what each juror was told.

Id. at 677-78. Pender has likewise made a sufficient showing to justify an evidentiary hearing. This Court should remand for a hearing.

The shock device used in this case prejudiced Pender in an additional way—in a manner not disputed by the State. A shock device is used to threaten tortuous pain. In other words, the shock device psychologically intimidates and controls a person. Mr. Pender's declaration makes it clear that his ability to consult with counsel was impaired as a result of the threat of being shocked for making a misperceived move.

At least one court has adopted a total ban on the use of stun devices during trial. See *Wrinkles v. State*, 749 N.E.2d 1179, 1192-1196 (Ind. 2001). Wrinkles, a capital murder defendant, appealed from the denial of post-conviction relief, assigning error to — *inter alia* — his trial counsel's failure to object to the use of a stun belt. Although it held that then-existing law would have countenanced counsel's failure to object, the Indiana

Supreme Court recounted the facts that, in its view, made the use of stun devices during trial troubling and exercised its supervisory authority to forbid their use prospectively. *Id.* at 1192-1195. Its prospective holding was based on its conclusion that "other forms of restraint… can do the job without inflicting the mental anguish that results from simply wearing the stun belt and the physical pain that results if the belt is activated." *Id.* at 1195.

While not outright forbidding the use of stun devices during trial, numerous courts have joined *Wrinkles* in showing concern about the risks those devices pose and in setting limits on their use. Even the most permissive of these courts draws the line when the physical restraint of a defendant creates a danger of impinging on the defendant's right to a fair trial. *See e.g. Young v. State*, 269 Ga. 478(2), 499 SE2d 60, 61 (1998), citing *Chancey v. State*, 256 Ga.415, 435(9), 349 S.E.2d 717 (1986).

In *Gonzalez v Pliler*, 341 F.3d 897 (2010), a habeas case, the Ninth Circuit concluded that an evidentiary hearing was necessary to address Gonzalez's contention that being made to wear a stun belt infringed on his due-process right to a fair trial. The Ninth Circuit first elaborated on the rationale for giving searching scrutiny to the use of stun belts and then articulated a test for their use.

The use of stun belts, depending somewhat on their method of

deployment raises all of the traditional concerns about the imposition of physical restraints. The use of stun belts, moreover, risks 'disrupt[ing] a different set of a defendant's constitutionally guaranteed rights.' *United States v. Durham,* 287 F3d 1297, 1305 (11th Cir 2002). Given 'the nature of the device and its effect upon the wearer when activated, requiring an unwilling defendant to wear a stun belt during trial may have significant psychological consequences.' *Mar,* 124 Cal Rptr 2d 161, 52 P 3d at 97. These 'psychological consequences,' *id.,* cannot be understated. Stun belts, for example, may 'pose[ ] a far more substantial risk of interfering with a defendant's Sixth Amendment right to confer with counsel than do leg shackles.' *Durham,* 287 F3d at 1305. We have long noted that 'one of the defendant's primary advantages of being present at the trial[ ] [is] his ability to communicate with his counsel.' *Spain* [*v.Rushen*], 883 F2d [712,] 720 [(9th Cir 1989)]; *see also Kennedy v.Cardwell,* 487 F2d 101, 106 (6th Cir 1973) (asserting that restraints confuse mental faculties and thus abridge a defendant's constitutional rights). Stun belts may directly derogate this 'primary advantage[ ],'*Spain,* 883 F2d at 720, impacting a defendant's right to be present at trial and to participate in his or her defense. As the Eleventh Circuit recently observed, '[w]earing a stun belt is a considerable impediment to a defendant's ability to follow the proceedings and take an active interest in the presentation of his case.' *Durham,* 287 F3d at 1306. 'The fear of receiving a painful and humiliating shock for any gesture that could be perceived as threatening likely' hinders a defendant's participation in defense of the case, 'chill[ing] [that] defendant's inclination to make any movements during trial — including those movements necessary for effective communication with counsel.' *Id.*at 1305.

"For like reasons, a stun belt may 'materially impair and prejudicially affect' a defendant's 'privilege of becoming a competent witness and testifying in his own behalf.' *Mar,* 124 Cal Rptr 2d 161, 171, 52 P3d at 104. In the course of litigation, it is 'not unusual for a defendant, or any witness, to be nervous while testifying.' *Id.* at 110. '[I]n view of the nature of a stun belt and the debilitating and humiliating consequences that such a belt can inflict,' however, 'it is reasonable to believe that many if not most persons would experience an increase in anxiety if compelled to wear such a belt while testifying at trial.' *Id.* This 'increase in anxiety' may impact a defendant's demeanor on the stand; this demeanor, in turn, impacts a jury's perception of the defendant, thus risking material impairment of and prejudicial affect on the

> defendant's 'privilege of becoming a competent witness and testifying in his own behalf.' *Id.* at 104(quoting *People v. Harrington,* 42 Cal 165, 168 (1871)).
>
> "For these reasons, 'a decision to use a stun belt must be subjected to at least the same close judicial scrutiny required for the imposition of other physical restraints.' *Durham,* 287 F3d at 1306 (citations and internal quotation marks omitted). And for these reasons, before a court may order the use of physical restraints on a defendant at trial, 'the court must be persuaded by compelling circumstances that some measure [is] needed to maintain the security of the courtroom,' and, as noted, 'the court must pursue less restrictive alternatives before imposing physical restraints.' *Morgan v. Bunnell,* 24 F3d 49, 51 (9th Cir 1994) (citations and internal quotation marks omitted)."

Gonzalez, 341 F3d at 900-901. Gonzalez prevailed following the evidentiary hearing on remand. The magistrate judge who conducted the evidentiary hearing found as a fact that, following a deputy's explanation that the stun belt would be activated if Gonzalez spoke to anyone during his trial, Gonzalez was intimidated from speaking to his counsel. What resulted was a constructive denial of counsel under *United States v. Cronic*, 466 US 648, 659, 104 S Ct 2039, 80 L Ed 2d 657 (1984), entitling Gonzalez to habeas relief. The state appealed, but the Ninth Circuit, in a memorandum disposition, affirmed. *Gonzalez v. Pliler*, 395 Fed. Appx 453 (9th Cir 2010).

At a minimum, Pender is entitled to an evidentiary hearing where the court should also determine whether and to what extent the shock device interfered with Pender's ability to consult with counsel and how it altered his demeanor and behavior at trial.

3. The State Charged Pender With a Deadly Weapon Enhancement, But He Was Sentenced for a Firearm.

Mr. Pender's charging document language is identical to the language in *Recuenco,* which the Washington Supreme Court held charged only a deadly weapon. *State v. Recuenco,* 163 Wn.2d 428, 180 P.3d 1276 (2008) (*Recuenco III*).

Both charging documents charge a "deadly weapon" violation, and then allege that a firearm was the deadly weapon.

However, an operable firearm is not a deadly weapon—not since the passage of Hard Time for Armed Crime. Since the passage of I-159, deadly weapon enhancements no longer include firearms. As a result, this Court should order that Pender either be retried or resentenced without the deadly weapon enhancement.

In *Pers. Restraint Petition of Cruze,* 169 Wn.2d 422, 237 P.3d 274 (2010), the court held that the "Hard Time for Armed Crime Act" ("HTACA"), took what was formerly a single sentence enhancement for offenders armed with a deadly weapon and replaced it with two sentence enhancements: one for offenders armed with a firearm and one for offenders armed with a "deadly weapon as defined by this chapter *other than a firearm.*" The court noted that "whereas the former 'deadly weapon' sentence enhancement provided for up to two additional years of imprisonment regardless of the deadly weapon used, the new scheme

authorized up to five years for those armed with firearms and up to two years for those armed with a deadly weapon *other than a firearm*." *Id.* (emphasis in original).

Put another way, the court held that the HTACA amendments do not distinguish between enhancements for use of a "firearm" and for use of a "deadly weapon"; they distinguish between enhancements for use of a "firearm" and for use of a "deadly weapon *other than* a firearm." *Id.* at 430 (emphasis in the opinion).

The *Cruze* court makes it clear that the "deadly weapon" charge has been broken into two *mutually exclusive* sub-parts: firearms and deadly weapons other than firearms. As a result, Pender cannot be convicted for a "deadly weapon" enhancement based on the use of a firearm—the only weapon alleged in this case.

C. CONCLUSION

Based on the above, this Court should remand Pender's first two claims for an evidentiary hearing or should remand for a new trial.

DATED this 13th day of February, 2012.

Respectfully Submitted:
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